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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

RAMON PIMENTEL,

Defendant and Appellant.

B237897

(Los Angeles County
Super. Ct. No. KA091823)

APPEAL from an order of the Superior Court of Los Angeles County,
Steven P. Sanora, Judge. Affirmed.

Alejandro Garcia for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Lance E. Winters, Assistant Attorney General, Paul M.
Roadarmel and Steven D. Matthews, Deputy Attorneys General, for Plaintiff and
Respondent.

INTRODUCTION

Defendant Ramon Pimentel pled guilty to possession for sale of a controlled substance (Health & Saf. Code, § 11378) while personally armed with a firearm (Pen. Code, § 12022, subd. (c)) but five months later moved to withdraw his plea, claiming that trial counsel had failed to adequately inform him about the immigration consequences of this plea. Conflicting evidence was presented to the trial court about the nature and extent of trial counsel's advice. The trial court resolved the credibility issue against defendant and denied the motion. This defense appeal follows. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Defendant's Guilty Plea*

On September 7, 2010, the People filed a two-count felony complaint charging defendant with possession for sale of a controlled substance (Health & Saf. Code, § 11378) and possession of a controlled substance while armed with a loaded rifle (Health & Saf. Code, § 11370.1, subd. (a)). As to the first count, the complaint alleged that defendant was personally armed with a firearm (Pen. Code, § 12022, subd. (c)).

On October 5, 2010, prior to the preliminary hearing, defendant, represented by attorney Albert Perez (Perez), pled guilty to the first count and admitted the enhancement allegation in return for an agreed upon sentence. Defendant signed a preprinted four-page "Felony Advisement of Rights, Waiver, and Plea Form."

Insofar as is relevant to this appeal, defendant initialed the following advisement:

"CONSEQUENCES OF MY PLEA [¶] . . . [¶] 12. Immigration

Consequences – I understand that if I am not a citizen of the United States, *I must expect my plea of guilty or no contest will result in my deportation*, exclusion from admission or reentry to the United States, and denial of naturalization and

amnesty.” (Italics added.) In addition, defendant initialed the advisements that prior to entering his plea, he had had a full opportunity to discuss the consequences of the plea with counsel and that he had no further questions of either counsel or the trial court.

Immediately prior to taking the plea, the prosecutor advised defendant, among other things, that “if you’re not a citizen of the United States, you will face deportation, exclusion from admission, or denial of naturalization” and asked if defendant understood “all of those things [he had] explained.” Defendant replied “Yes.” The prosecutor asked if defendant had “any questions about the rights or the obligations that [he had] just [gone] over” and whether he would “like to take a moment to talk to [his] attorney about anything before [he] took [his] plea.” Defendant responded “no” to each question.

After defendant entered his plea, the trial court imposed a suspended six-year sentence and placed him on probation for three years on various conditions, including that he spend 365 days in county jail.

2. Defendant’s Motion to Withdraw His Guilty Plea and to Vacate the Judgment

On March 8, 2011, defendant moved to withdraw his guilty plea and to vacate the judgment. (Pen. Code, § 1018.) Attorney Alejandro Garcia (Garcia) represented defendant in this motion. Defendant presented documentary evidence to establish that he is a citizen of Mexico; that he had been a lawful permanent resident of the United States since 1995; and that in November 2010, the United States Department of Homeland Security (Homeland Security) informed him that he was subject to removal from the United States as a result of his conviction. To support his claim that trial counsel Perez had not adequately informed him about the immigration consequences of his guilty plea, defendant offered declarations from himself, his sister and his aunt.

Defendant's declaration averred, in relevant part:

"I recall speaking to Mr. Perez only two times, the first being in Court on September 14, 2010. I also spoke to Mr. Perez for about five minutes on October 5, 2010, the day of my plea. The total amount of time I spoke to Mr. Perez combined was about five minutes. . . .

"At no time between September 14, 2010 and October 5, 2010, did I have any kind of conversation or discussion regarding the immigration consequences of my plea with Mr. Perez. Mr. Perez never even asked me about my immigration status. I speak fluent English and I communicated in English with Mr. Perez.

"Prior to accepting my guilty plea, the Court read to me what I now understand was the admonition under Penal Code § 1016.5 that I could be deported, excluded, or denied naturalization as a result of my plea.

"At the time that I entered the guilty plea recommended by Mr. Perez, I did not understand that I would be deported, excluded from admission, or denied naturalization as a result of my plea. I did not believe that the Court's admonition would mean anything to me or apply to me because Mr. Perez never indicated that it would be a problem and I agreed automatically to everything to which Mr. Perez nodded. . . .

"Had I been advised by my counsel that I would be facing deportation from the United States, I would have taken greater risks and would not have pled guilty. I would have attempted to obtain an acquittal, a dismissal, or, a conviction under another charge that would not have adverse immigration consequences or allow me to seek a waiver for my offense."

The declaration from defendant's sister averred:

"My mother retained attorney Albert Perez Jr. to represent my brother in his criminal matter. I was present at the meeting wherein my mother hired attorney Perez as Mr. Perez does not speak Spanish and I had to translate for my mother. At no point during the consultation did attorney Perez ever ask for the immigration status of

my brother and I did not communicate my brother's immigration status to attorney Perez either.

“On October 5, 2010, the day of [my brother's] sentencing, I heard the Court mention something regarding immigration. After the hearing was over, and in the hallway outside of the courtroom, I asked attorney Perez what the immigration stuff meant. Attorney Perez stated that it was simply something the Court had to tell all defendants. Since he did not seem concerned, I did not think any more of it.”

The declaration from defendant's aunt described a meeting that she and defendant's mother had attended at Perez's office in November 2010 after Homeland Security had contacted defendant.

“At the outset of the meeting [in November 2010] with attorney Perez, attorney Perez began talking and stated that he was surprised that [defendant] was having problems with immigration because ‘that was not supposed to happen.’ Attorney Perez said that [defendant] was not supposed to have problems with immigration because he had gotten county jail time and not prison time. Attorney Perez stated that immigration only gets involved when there is a sentence of over 365 days and/or when people go to state prison.

“Attorney Perez stated that that is why he worked so hard to get [defendant] the deal of 365 days of county time. Attorney Perez stated that he had to talk to a District Attorney Supervisor, who was a friend of his, to get [defendant] the deal. Attorney Perez also stated that that was the best deal he could get for [him] because [he] had confessed to the crime.”

Without any objection from the defense, two letters from Perez (defendant's previous trial counsel) were presented to the court.¹ Each letter

¹ The record does not indicate who presented the two letters, each of which is contained in the superior court file.

was addressed to defendant's (second) attorney Garcia, with a copy being sent to the District Attorney's Office.

Perez's first letter read, in pertinent part:

"I have received your letter with your attached motion [to withdraw defendant's guilty plea] and will respond as follows. Your letter and motion have put me in an awkward position, as I do not want to see [defendant] separated from his family but I will not be untruthful.

"It is my custom and practice to review the plea form with my clients, including any immigration consequences. The majority of my clients are Hispanic, so I am sensitive to issues that may arise. I reviewed the entire plea form with [defendant].

"If you would like to know what [defendant] and I discussed, please send me a waiver of his Attorney Client Privilege with me.

"Additionally, I did request different charge(s) from [defendant's] Deputy District Attorney Keith Thompson, but that was rejected.^[2] Mr. Thompson indicated that he had a strong case and was not going to negotiate the charges.

"Regarding [defendant's sister] and Aunt, I disagree with their statements to you."

Perez's second letter read, in pertinent part:

"Based on the waiver of Attorney Client Communications you presented to my office, I will share the relevant conversations [defendant] had with me.

"[Defendant] acknowledged his charges, guilt, truthfulness of the Police reports and his immigration status when discussing his case

² Thompson represented the People at the proceeding in which defendant entered his guilty plea.

and plea. He made it clear to me that he did not want to go to state prison and would accept a county jail offer. *[Defendant] also informed me that he understood he would get deported if he pled to the charge regardless of the sentence.* Further, there was a conversation regarding an immigration attorney he had or his mom had or who was currently handling their/his immigration status, who could handle the deportation case. (I do not remember the name of the attorney.)” (Italics added.)

3. *The Trial Court’s Ruling*

On August 29, 2011, the trial court (the same judge who had accepted defendant’s plea) conducted a hearing on defendant’s motion. Based upon its review of all of the documents presented to it, the court denied “without prejudice” the motion to withdraw the plea. It noted that Perez’s statements³ were “in direct opposition to what everybody else contends” and that neither defendant’s sister nor aunt “were present when the defendant had discussions [with Perez], so they can’t really speak to what was said and not said.”

This appeal follows.⁴

DISCUSSION

Defendant contends that trial counsel (Perez) failed to adequately advise him of the immigration consequences of his plea and that said failure constituted ineffective assistance of counsel and thus good cause to withdraw his guilty plea. Stated another way, defendant urges that based upon his evidentiary showing, the

³ At the hearing, the trial court referred to a declaration from Perez. We assume that the trial court misspoke and was referencing Perez’s letters since the superior court file contains the two letters from Perez but no declaration.

⁴ The trial court granted defendant’s motion to issue a certificate of probable cause. (Pen. Code, § 1237.5.)

trial court abused its discretion in denying the motion to withdraw his guilty plea. We are not persuaded.

On appeal, it is the defendant's burden to demonstrate by an adequate record that the trial court abused its discretion. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1250.) We never presume error occurred; in fact, we are required by the rules of appellate review to presume that the trial court's ruling was correct. (*People v. Green* (1979) 95 Cal.App.3d 991, 1001.)

In this instance, defendant failed to present an adequate record to establish reversible error. The record on appeal he furnished did *not* include Perez's two letters that the trial court referenced when it denied defendant's motion to withdraw his guilty plea. Defendant's brief acknowledged this deficiency in the record but he made no effort to augment the record to include the letters. Having failed to provide those two letters, defendant cannot now complain about the trial court's exercise of discretion. On that basis alone, we could affirm the trial court's ruling.

However, on our own motion, we augmented the record on appeal to include the superior court file containing Perez's two letters. (Cal. Rules of Court, rule 8.155(a)(1)(A).) We therefore turn to the merits of the defendant's contention.

Penal Code section 1018 provides that the trial court "may . . . for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted." "To establish good cause, it must be shown that defendant was operating under mistake, ignorance, or any other factor overcoming the exercise of his free judgment. [Citations.] . . . 'The burden is on the defendant to present clear and convincing evidence the ends of justice would be subserved by permitting a change of plea to not guilty.' [Citation.] [¶] 'When a defendant is represented by counsel, the grant or denial of an application to withdraw a plea is purely within the discretion of the trial court after consideration of all factors

necessary to bring about a just result. [Citations.] On appeal, the trial court's decision will be upheld unless there is a clear showing of abuse of discretion. [Citations.]” (*People v. Weaver* (2004) 118 Cal.App.4th 131, 145-146.) “An abuse of discretion is found if the court exercises discretion in an arbitrary, capricious or patently absurd manner resulting in a manifest miscarriage of justice.” (*People v. Shaw* (1998) 64 Cal.App.4th 492, 496.)

Here, the crux of defendant's claim, set forth in his declaration, was that Perez failed to advise him about the immigration consequences of his plea. Perez directly denied this, stating that defendant told him “*that he understood he would get deported if he pled to the charge regardless of the sentence.*” (Italics added.) In denying defendant's motion, the trial court implicitly credited Perez's version of the events. That credibility finding is binding upon us. (*People v. Gutierrez* (2003) 106 Cal.App.4th 169, 176.)

Further, the record of the proceeding in which defendant pled guilty rebuts defendant's claim that he was unaware of the immigration consequences of his guilty plea. Defendant signed the four-page plea form that included the acknowledgement that his plea would result in deportation if he was not a citizen. In addition, the prosecutor advised him that if he was not a citizen, he would face deportation and defendant stated he understood that advisement.

In sum, defendant has failed to establish that the trial court abused its discretion when it (implicitly) found that he had not proven, by clear and convincing evidence, that good cause existed to withdraw his guilty plea.

DISPOSITION

The trial court's August 29, 2011 order denying defendant's motion to withdraw his guilty plea is affirmed.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.